United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 74-2234

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

NATIONAL LABOR RELATIONS BOARD,

Appellant,

v.

FREDERICK COWAN AND COMPANY, INC.,

Appellee.

P/S

On Appeal from an Order of
the United States District Court of
The Eastern District of New York

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUE PRESENTED

Whether the District Court improperly refused to enforce an *Excelsior* list subpoena seeking relevant, proper and limited information in a class of proceeding the Board is empowered to conduct.

STATEMENT OF THE CASE

This case is before the Court on the appeal of the National Labor Relations Board from an order of the District Court for the Eastern District of New York refusing to enforce a subpoena *duces tecum* directed to Frederick Cowan and Company, Inc. (herein "the Company") pursuant to Section 11 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*, herein "the Act"). The jurisdiction of the Court is invoked under 28 U.S.C. 1291 and 1294.

STATEMENT OF THE FACTS

A. Background[1]

On February 6, 1973,[2] Local Lodge No. 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (herein "the Union") filed a representation petition with the Board seeking to represent the Company's employees (Case No. 29-RC-2175) (A. 10-12).[3] On February 21, representatives of the Company, the Union and the Board met for purposes of negotiating a stipulation concerning the circumstances under which the election would be held. The parties finally

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[1] The facts as set forth herein are based upon the decision of the Administration Law Judge, as affirmed by the Board, in the related Board proceeding herein. The decisions of the Administrative Law Judge and the Board were attached to the Regional Director's application for enforcement of subpoena in the court below as Exhibits B & C, and the facts as set forth therein were not contested by the Company in the proceedings below.

[2] All dates hereafter are 1973 unless noted otherwise.

[3] "A." references are to the printed Appendix.

agreed upon the time and place of the election, the appropriate unit, and the eligibility of various employees to vote. The Board agent then advised the Company that it would have to supply a list of names and addresses of the employees in the unit, pursuant to the Board's decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).[4] The Company, which had earlier supplied a partial list of the eligible employees' names, supplemented that list to include the names of all 28 eligible employees (A. 23). It at first refused to supply any of the employees' addresses, but then offered to supply them only for those employees who agreed to have them turned over. The Union accepted this proposal, on the understanding that if it lost the election, it could offer the Company's failure to supply a complete *Excelsior* list as grounds for setting the election aside[5] (A. 22-24). At the conclusion of the meeting, the parties executed a stipulation for certification upon consent election, setting forth the circumstances under which the election would be conducted, *i.e.*, the unit in which the election would be conducted, and the date, time, and place thereof.

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[4] In *Excelsior, supra*, the Board held that a list of the names and addresses of all employees eligible to vote in an election must be filed with the Regional Director within 7 days after the direction of election or after the close of the determinative payroll period for eligibility purposes, whichever is later. The Regional Director makes the list available to all parties in the representation proceeding to promote "an informed employee electorate" and to aid in challenging the ballots of those believed to be ineligible to vote. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969), approving *Excelsior Underwear, Inc., supra.*

[5] As noted, the Board held in *Excelsior Underwear, supra*, that failure to supply a complete list of names and addresses of all eligible employers is grounds for setting aside an election. However, rather than delay all elections in which employers fail to comply with the *Excelsior* requirement pending their voluntary or compelled compliance, the Board's policy is to proceed with the election and then, if the petitioning party loses the election, to overturn the election upon timely objection to the failure to supply a proper list. Thereafter, a new election will be scheduled, before which the employer will be compelled, by subpoena if necessary, to supply the list. See, N.L.R.B. Field Manual Section 11312.

The next day, February 22, the Regional Director wrote to the Company, advising it that he had approved the stipulation, that the Company would be required to submit a complete *Excelsior* list by March 2, and that failure to comply with the *Excelsior* requirement would be grounds for setting aside the election (A. 27). That same day, the Company polled its employees to ascertain which of them would permit their addresses to be turned over to the Board, and, having received permission from only 11 of the 28 eligible employees, delivered their addresses to the Board on March 7 (A. 26).

Pursuant to the stipulation, an election was held on March 14, which the Union lost by 11 votes to 12 with 2 challenged ballots (A. 12). The Union filed objections to the conduct of the election, based, *inter alia*, on the Company's failure to supply a complete *Excelsior* list, and several employees filed unfair labor practice charges. The charges and objections were consolidated for hearing before an Administrative Law Judge (A. 12). Concerning the objection, the Administrative Law Judge found that there had been no meeting of the minds between the Company and the Union concerning the acceptability of a partial *Excelsior* list (A. 24). He further found that the Regional Director had specifically advised the Company after the parties had executed the election stipulation that it was required to submit a complete *Excelsior* list, and that the Company had never challenged this requirement, but had simply failed to comply therewith by submitting an incomplete and untimely list (A. 27). Regarding the unfair labor practice charges, the Administrative Law Judge found that the Company had violated Section 8(a)(1) of the Act by polling its employees in connection with the supplying of the list, bargaining directly with them concerning the terms and conditions of their employment, promising them benefits to induce them to abandon the Union, and coercively interrogating them as to their union activities (A. 15-22). On the basis

of all of the above findings, the Administrative Law Judge recommended that the election and the stipulation for certification upon consent election be set aside, and that the Union's representation petition be processed in accordance with usual Board procedures (A. 27).

The Company filed no exceptions to the findings, conclusions, or recommended order of the Administrative Law Judge, and the Board accordingly adopted the recommended order, set aside the election and the stipulation for certification upon consent election, and remanded the representation case to the Regional Director for appropriate action (A. 33-34).

Following the Board's remand, a representation hearing was held at which the Company did not participate. Thereafter, the Regional Director on April 10, 1974 issued a decision and direction of election pursuant to Section 9(c)(1) of the Act, directing a second election and requiring the filing of an *Excelsior* list by April 17, 1974 (A. 35-37). The Company did not file the list but on April 18, 1974 telegraphically requested an "extension of time regarding *Excelsior* requirement – letter will follow" (A. 38). No further communication from the employer was received and the Regional Director denied the request for extension on May 3, 1974 (A. 39). The Union requested that the second election not be conducted until the *Excelsior* list was furnished and asked the Board to compel its production (A. 6). Thereafter, the Regional Director caused a subpoena *duces tecum* to issue to the Company on May 6, 1974, pursuant to Section 11(1) of the Act,[6] requiring alternatively the *Excelsior*

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[6] Section 11(1) of the Act states, in pertinent part:

> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.

(continued)

list, or books and records containing the necessary information (A. 40). On May 15, 1974, a hearing before a hearing officer was conducted for receipt of the subpoenaed materials, and although the Company had never petitioned the Board to revoke the subpoena, the Company failed to appear or produce the materials (A. 41-46).

B. Proceedings in the District Court

On May 23, 1974, the Board filed an application in the district court for enforcement of its subpoena pursuant to Section 11(2)[7] of the Act (A. 1, 3-8). The district court (Platt, J.) considered the Board's action in setting aside the stipulation for certification upon consent election

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[6] (continued):

> The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding [or investigation] requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required . .. . .

[7] Section 11(2) of the Act provides as follows:

> (2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

erroneous (A. 50), concluded "that the law actively encourages compromise and settlement of disputes" (A. 51) and refused to order production of the names and addresses of nonconsenting employees (A. 52). The Court also questioned the substantive wisdom of the *Excelsior* rule (A. 52).

ARGUMENT

THE DISTRICT COURT EXCEEDED THE NARROW CONFINES OF THE PROPER INQUIRY UPON APPLICATION FOR ENFORCEMENT OF ADMINISTRATIVE SUBPOENAS

It is well-settled law that the "scope of permissible judicial inquiry in deciding whether . . . an application [for subpoena enforcement] should be granted or denied . . . is extremely limited." *N.L.R.B. v. C.C.C. Associates, Inc.*, 306 F.2d 534, 538 (C.A. 2, 1962). If the inquiry shows that the subpoena has been issued in accordance with proper statutory procedures and requires the production of specific records under reasonable conditions, it is entitled to enforcement subject only to the requirement that the Board is acting within its statutory authority in a general class of proceeding that it is empowered to conduct and that the information sought is not "plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 216 (1946); *N.L.R.B. v. C.C.C. Associates, supra*, 306 F.2d at 538; *N.L.R.B. v. United Aircraft Corp.*, 200 F. Supp. 48, 50-51 (D. Conn., 1961), aff'd. per curiam, 300 F.2d 442 (C.A. 2, 1962). Accord: *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (C.A. 2, 1970).[8]

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[8] See also: *Jackson Packing Co. v. N.L.R.B.*, 204 F.2d 842 (C.A. 5, 1953); *N.L.R.B. v. Williams*, 396 F.2d 247 (C.A. 7, 1968); *N.L.R.B. v. Friedman*, 352 F.2d 545, 547 (C.A. 3, 1965); *Link v. N.L.R.B.*, 330 F.2d 437, 440 (C.A. 4, 1964); (continued)

The Board's wide degree of discretion under Section 9 of the Act, wherein Congress empowered the Board to conduct representation investigations, regulate elections, certify election results and subpoena documents in aid of these authorized functions, is unquestionable. *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940); *N.L.R.B. v. A.J. Tower Company*, 329 U.S. 324, 330 (1946); *N.L.R.B. v. Duval Jewrlry Co.*, 357 U.S. 1 (1958). The *Excelsior* rule, requiring production of a list of names and addresses of all eligible voters, was specifically sanctioned by the Supreme Court in *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969), as was the use of a subpoena pursuant to Section 11 of the Act to secure production of the list. *Id.* at 768-769. Accord: *N.L.R.B. v. Rohlen*, 385 F.2d 72 (C.A. 7, 1967); *N.L.R.B. v. Hanes Hosiery Div.*, 384 F.2d 188 (C.A. 4, 1967); *British Auto Parts, Inc. v. N.L.R.B.*, 405 F.2d 1182 (C.A. 9, 1968). As this Court has noted: "The *Excelsior* rule and the subpoenas issued in aid of the rule are designed to assist the Board in fulfilling the statutory duties to investigate questions of representation and to supervise representation elections." *N.L.R.B. v. Beech-Nut Life Savers, Inc.*, 406 F.2d 253, 259 (C.A. 2, 1968), cert. denied, 394 U.S. 1012.

The subpoena sought to be enforced in the instant case was duly issued in representation Case No. 29-RC-2175 to enable the Board to conduct a fair second election, under conditions designed to promote a free and reasonable employee choice, after the Company's unfair labor practices and refusal to supply the *Excelsior* list had caused the first election to be set aside (A. 27). The subpoena required, alternatively,

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[8] (continued) *Cudahy Packing Co. v. N.L.R.B.*, 117 F.2d 692, 694 (C.A. 10, 1941); *N.L.R.B. v. Gunaca*, 135 F. Supp. 790, 795-796 (E.D. Wisc., 1955), aff'd., 230 F.2d 542 (C.A. 7, 1956), vacated as moot, 353 U.S. 902.

the production of either the *Excelsior* list or of books and records permitting the Board to construct the list. The list was thus properly subpoenaed for use in a proceeding the Board was empowered to conduct and was plainly reasonable and relevant. *Wyman-Gordon, supra; N.L.R.B. v. Beech-Nut Life Savers, supra,* 406 F.2d at 259. Accordingly the District Court's consideration of the case should have ended and enforcement of the subpoena should have issued.[9]

The Court below disregarded the scope of the proper inquiry (*supra,* p. 7-8), and instead chose to rule on the propriety of the Administrative Law Judge's finding, affirmed by the Board, that there had been no meeting of the minds between the parties regarding the acceptability of the Company's offer to submit a partial list during the first election. However, the propriety of that finding was plainly not within the limited scope of inquiry presented in the subpoena enforcement proceeding before the district court. Nor could it have been, since it is well-settled that Congress has entrusted to the Board all matters concerning the conduct of elections, subject only to such indirect review as is available if and when a representation determination forms the basis for a final order issued in an unfair labor practice

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[9] Frederick Cowan, president of the Company, objected to the disclosure of the employees' addresses on the grounds that this was private and privileged information which should not be disseminated to outsiders (A. 24). Such contentions regarding the potential hazards of disclosure of employee addresses were considered and rejected by the Supreme Court in *Wyman-Gordon, supra,* 394 U.S. at 766, and the various Courts of Appeals. *E.g., N.L.R.B. v. Q-T Shoe Manufacturing Co., Inc.,* 409 F.2d 1247, 1250 (C.A. 3, 1969). As the Court stated in *N.L.R.B. v. Delaware Valley Armaments, Inc.,* 431 F.2d 494, 498 (C.A. 3, 1970), cert. denied, 400 U.S. 957:

> It is for the Board, and not for a court, to weigh the Board's interest in assuring a fair election against "the asserted interest of employees in avoiding the problems that union solicitation may present."

See *N.L.R.B. v. Rohlen, supra,* 385 F.2d at 55 n. 2.

proceeding and reviewable in the Court of Appeals under Section 10(e) and (f) of the Act. *A.F.L. v. N.L.R.B.*, 308 U.S. 401, 409 (1940); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *United Federation of College Teachers, Local 1460, American Federation of Teachers, AFL-CIO v. Miller, et al.*, 479 F.2d 1074 (C.A. 2, 1973).[10]

But in any event, the Board was clearly acting within the scope of its authority under Section 9 when it set aside the election and underlying stipulation and applied to the court below for enforcement of its subpoena. Cf. *N.L.R.B. v. W.S. Hatch Co.*, 474 F.2d 558, 561 (C.A. 9, 1973). As shown above, it is the Board's policy, absent objection from the petitioning (or intervening) union, to hold one election without the *Excelsior* list if the employer fails to supply it, and then, if the union loses the election and files a timely objection, to set aside that election and compel production of the list before conducting a second election. Thus, whatever the parties' agreement regarding the type of list to be supplied for the first election, that election has now been set aside, and the agreement is no longer relevant. The Company is apparently contending that it entered into the agreement not realizing that the Union could challenge its failure to supply a complete list upon losing the election and thereby have the election set aside. However, as noted, the Regional Director specifically informed the Company the day after the Stipulation and underlying agreement were entered into that an *Excelsior* list was required and that failure to supply it would be grounds for setting the election aside,

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[10] Of course, even if the Board eventually certifies the Union herein, and the Board's rulings in the representation proceeding form the basis for an order issued in an unfair labor practice proceeding, the Company would be precluded from challenging the Administrative Law Judge's finding since it failed to file exceptions thereto with the Board (A. 33). Section 10(e) of the Act; *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 255-256 (1943); *N.L.R.B. v. Local 3, Int'l Brotherhood of Electrical Workers*, 362 F.2d 232, 234-235 (C.A. 2, 1966).

and the Company never questioned this statement. Moreover, it was not a part of the agreement that the Company could submit the list late with impunity; yet it submitted its partial list to the Board approximately a week past the deadline – a fact which in itself is grounds for setting the election aside under the Board's *Excelsior* requirement. And finally, the election was set aside on the wholly independent ground that the Company had committed numerous violations of the Act immediately prior to the holding of the election. Under these circumstances, the Board's actions setting aside the election and the stipulation underlying it and proceeding to obtain a proper *Excelsior* list prior to the holding of the second election were clearly proper.

Finally, the court below erred in rejecting the Board's contention that the Company was estopped from challenging the Board subpoena because of its failure to exhaust its administrative remedies. Thus, the Company failed to even participate in the representation hearing after the Board's remand, and never challenged the *Excelsior* list requirement contained in the decision and direction of the second election (A. 35-37, 39). Nor did the Company ever file a timely (or even an untimely) petition to revoke the Board's *Excelsior* subpoena (A. 41-46), as required in Section 11(1) of the Act (see *supra*, p. 6, n. 6).[11] The statutory provision gives the Board the opportunity to consider potential

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[11] The Board's Rules and Regulations also require a petition to revoke within five days as does the statute. Thus, Series 8 (29 C.F.R.) Section 102.31(b) provides:

> Any person served with a subpena, whether *ad testificandum* or *duces tecum*, if he does not intend to comply shall within five days after the date of service of the subpena upon him, petition in writing to revoke the subpena. . . .

objections to a subpoena so that any defect in its scope or issuance may be corrected. Thus, it serves a function similar to Section 10(e), which requires that objections to a Board order be filed with the Board before a Court of Appeals will entertain them to "afford the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field v. N.L.R.B., supra,* 318 U.S. at 256 and cases cited, *supra,* p. 10, n. 10.[12] The Courts have uniformly held that parties who have not petitioned the Board to revoke a subpoena are estopped from contesting the subpoena before the court. *N.L.R.B. v. McLean,* 47 LRRM 2498, 2499 (S.D.N.Y., 1960); *N.L.R.B. v. Brown and Root, Inc.,* (Civil No. 4922, (S.D. Tex., 1949)) (unreported); *N.L.R.B. v. Brown, et al.,* 5 Labor Cases, ¶60,986 (N.D. Ala., 1942).[13]

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[12] Senator Taft, co-sponsor of the 1947 amendments to the Act which added the provision to Section 11(1) requiring that a petition to revoke a subpoena be filed with the Board, noted that "the Board shall revoke its subpoena on a motion to quash if the evidence required is not relevant or not described with sufficient particularity." 93 Cong. Rec. 7002 (June 12, 1947). And Senator Murray attacked the requirement that a petition to revoke be filed precisely because "the citizen is now required to put himself to the trouble of answering any and every useless demand which may be made on him, after service of the subpoena." 93 Cong. Rec. 6656 (1947).

[13] In *N.L.R.B. v. Consolidated Vacuum Corp.,* 395 F.2d 416, 419 (C.A. 2, 1968), the employer filed a petition to revoke a subpoena with the Trial Examiner who granted it in part and denied it in part. Even though the employer did not specifically appeal the adverse aspect of the Examiner's ruling to the Board, the Board considered it in its review of the case. Since the Board had the opportunity to review the objection to its subpoena and had in practical effect exhausted the employer's rights for him, the court affirmed the order enforcing the Board's subpoena on the merits rather than merely for failure to exhaust remedies. Here, the situation is wholly different since the employer never indicated any objection to the subpoena to the Board, thus preventing the Board from considering any potential infirmities and making the case ripe for application of an estoppel for failure to exhaust.

In sum, since there was no petition to revoke the subpoena made to the Board, and since, in any event the subpoena was for materials held by the Supreme Court in *Wyman-Gordon* to be relevant and appropriate, the limited tests for enforcement of administrative subpoenas were satisfied and the Board's subpoena *duces tecum* was entitled to enforcement.[14]

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the order of the District Court should be reversed and the case remanded to the District Court for the entry of an order enforcing the Board's subpoena *duces tecum* in full.

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March, 1975.

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[14] The Company's contention below that there was no election case pending after the Board's decision and therefore no basis upon which to issue a subpoena was implicitly rejected even by the district court and is wholly erroneous. Though the representation (29-RC-2175) and the unfair labor practices cases (29-CA-3340-2-3) were consolidated for hearing, the Board's decision plainly remanded the representation case (A. 34) to the Regional Director since the first election was held to be invalidated by the Company's failure "to comply with the *Excelsior* rule" and by the "violations of Section 8(a)(1)" all of which "constitute grounds for setting aside the election" (A. 27).

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Appellee.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the Board's offset printed brief in the above-captioned case, has this day been serve by first-class mail upon the following counsel at the address listed below:

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Dated at Washington, D.C.
this 4th day of March, 1975.

Elliott Moore
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